88-1173

Supreme Court, U.S.
FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court Of The United States

October Term, 1988

WILLIAM PERRY PENDLEY, ADMINISTRATOR
TO THE ESTATE OF LEON H. CASSUTT, DECEASED,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN WILLIAM COMISKEY
(Counsel of Record)
COMISKEY & HUNT
4023 Chain Bridge Road
Fairfax, Virginia 22030
(703) 352-1700

Attorney for Petitioner

Balmar Legal Publishing Division, Washington, DC 20005, (202) 682-9800

63pp

QUESTIONS PRESENTED

Petitioner's decedent--a California citizen, employed by a California corporation which had entered into a contract with the United States Air Force in California--was killed while performing work pursuant to his employer's contract while at the site of another Government contractor in the Commonwealth of Virginia. Decedent's survivors, also California citizens, later received worker compensation benefits under the California Workers' Compensation Act.

Petitioner filed a claim against the Government under the Federal Tort Claims Act and after having it denied brought a wrongful death action under the Federal Tort Claims Act in Virginia. The United States District Court, having earlier granted Petitioner's Motion for Partial Summary Judgment as to Negligence, subsequently held, as a matter of law, that Virginia substantive law applied, that under Virginia law the United States was the "statutory employer" of decedent, that Petitioner's sole remaining remedy was the Worker's Compensation Act of the Commonwealth of Virginia, and that the United States District Court, therefore, lacked jurisdiction. The Fourth Circuit Court of Appeals affirmed.

The questions presented are as follows:

1) Whether, contrary to *Indian Towing Co.* v. *United States*, and *Rayonier, Inc.* v. *United States*, the Fourth Circuit Court of Appeals--in determining that the United States was the "statutory employer" of the decedent, and thus immune from suit--was correct in applying to the United States the "statutory employer" test reserved by the Supreme Court of the Commonwealth of Virginia only for government entities or public utilities, rather than the test reserved by the Virginia Supreme Court for a private individual, when the Federal Tort Claims Act specifically makes the United States liable "in the same manner and to the same extent as a private individual."

2) Whether the Fourth Circuit Court of Appeals, by applying the Virginia Worker's Compensation Act--and thereby allowing the United States to argue that it was decedent's "statutory

employer" and, therefore, immune from a Federal Tort Claims Action--rather than the California Workers' Compensation Act--which has no "statutory employer" concept and which, therefore, would absolutely have permitted such a suit, violated the "flexible balancing of the respective States' interests" test of *Pacific Employers Ins. Co.* v. *Industrial Accident Commission of California, et al.*, and *Thomas* v. *Washington Gas Light Co.*, and thereby violated the Full Faith and Credit Clause.

3) Whether the affirmative and intended actions of the United States Government and its counsel of waiting to seek a dismissal of the Complaint--until after the close of all discovery and just before trial--was a violation of 28 U.S.C. Section 1927, and Rule 11 of the Federal Rules of Civil Procedure for which sanctions, costs and attorneys' fees expenses should have been awarded when the United States and its counsel had complete and absolute knowledge of every fact necessary to make its dismissal argument prior to the Complaint ever being filed.

LIST OF PARTIES

The Petitioner is William Perry Pendley, Administrator to the Estate of Leon H. Cassutt, Deceased.

The Respondents are the United States of America, the United States Department of Defense, the United States Air Force, the United States Strategic Defense Initiative Organization; and the Honorable Edwin Meese, Attorney General of the United States.

The parties to the proceedings below were the Petitioner, William Perry Pendley, Administrator to the Estate of Leon H. Cassutt, Deceased, and the statutory beneficiaries, to wit: the widow and children of the late Leon H. Cassutt; and the Respondents, to wit: the United States of America and the above-named departments, offices, and officials of the United States Government.

On June 26, 1987, the United States Government filed a Motion to Dismiss all parties but the Administrator and the United States of America as the only proper parties. Petitioner did not oppose Respondent's Motion as to the party defendants. On July 17, 1987, the United States District Court dismissed all party plaintiffs except the Administrator.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
LIST OF PARTIES iii
OPINION BELOW 1
JURISDICTION 2
STATUTES INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 5
Summary 5
I. The Fourth Circuit, In Direct Conflict With The Holdings Of This Court, Erroneously Applied The Rulings Of The Supreme Court Of The Commonwealth Of Virginia By Applying To The United States Government A Test Reserved By The Virginia Supreme Court For State Government Entities And Public Utilities, Rather Than The Correct Test Under The FTCA, The One Applied By The Virginia Supreme Court To Private Individuals. 6
A. The Federal Tort Claims Act And This Court's Prior Holdings Require That The United States Be Held "Liable . . . As A Private Individual." 6
B. Virginia Has Two Alternative Tests For Ascertaining An Entity's Trade, Business, Or Occupation Pursuant To Determining Its Status As A "Statutory Employer" Under The Virginia Workers' Compensation Act And Hence Its Potential Immunity From A Civil Action: One For "Private Individuals" and Another For "Public Utilities and Government Entities." 7
C. The Fourth Circuit, In Direct And Apparent Conflict With This Court's Prior Holdings And Precedents, Erroneously Applied The

"Government Entity" Statutory Employer Test To The United States 8

D. The Decision Of The Fourth Circuit Is In Direct Conflict With The Decisions Of The Supreme Court Of The Commonwealth Of Virginia. 10

E. The Decision Of The Fourth Circuit Is In Conflict With Another Decision On The Very Same Issue By A Different Panel Of The Fourth Circuit. 11

F. The Important Role Of The Federal Tort Claims Act, In Promoting Safety Within The United States Government, While Simultaneously Providing Compassionate Relief To Those Injured By The Actions Of The Government, Is Seriously Undermined By The Decision Of The Fourth Circuit. 13

G. The Decision Of The Fourth Circuit, Affirming The Denial Of Jurisdiction By The United States District Court In This Matter, Constitutes Such A Departure From The Accepted And Usual Course Of Judicial Proceedings Regarding The Federal Tort Claims Act As To Call For An Exercise Of This Court's Power Of Supervision. 16

H. The Erroneousness Of The Fourth Circuit's Decision Constitutes A Subtle Erosion Of The Remedies Meant To Be Available, Under The Federal Tort Claims Act, To Individuals Injured Or Killed By The Negligent Conduct Of The United States. 16

II. The Fourth Circuit Erroneously Declined To Utilize The Workers' Compensation Act Of The State Of California In Determining Whether The United States District Court Possessed Jurisdiction To Hear A Petitioner's Federal Tort Claims Act And

Thereby Denied To The State Of California Full Faith And Credit For The Statute Which California Enacted To Provide Relief To An Employee For Injuries Occurring Elsewhere When The Contract Of Employment Was Entered Into In California. 18

A. The Decision Of The Fourth Circuit Is In Direct And Apparent Conflict With the Precedents And Prior Holdings Of This Court Relative To The Manner In Which A Decision Is Made Between The Workers' Compensation Statutes Of Two States Each Of Which Has An Arguable Interest In The Matter. 18

B. The Decision Of The Fourth Circuit Conflicts, In Principle, With the Precedents And Prior Holdings Of This Court In Which This Court, In Determining The Applicability Of The Full Faith And Credit Clause, Has Permitted Recovery By The Injured Worker. 23

C. The Decision Of The Fourth Circuit, Involving As It Does Important Issues Of The Interpretation Of The Federal Tort Claims Act, Especially As It Relates To The Full Faith And Credit Clause Of The Constitution, And Further Involving The Matter Of The Jurisdiction Of Federal District Courts, Merits The Granting Of Certiorari. 24

III. The Fourth Circuit--By Affirming The Decision Of The United States District Court Not To Grant Sanctions, Costs And Attorneys' Fees For The Violations, By The United States Government And Its Counsel, Of 28 U.S.C. Section 1927, And Rule 11 Of The Federal Rules Of Civil Procedure--Acted Contrary To The Principles Of The Decisions Of This Court And Other Circuits. 25

CONCLUSION 29

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES	PAGE
Alaska Packers Association v. *Industrial Accident Commission*, 294 U.S. 532, 55 S. Ct. 518, 79 L.Ed. 1044 (1934).	21, 24
Anderson v. *Thorington Construction Co.*, 201 Va. 266, 110 S.E.2d 396 (1959)	8, 11, 12
Baker Industries, Inc. v. *Cerberus Limited*, 764 F.2d 204 (3rd Cir. 1985)	27
Bassett Furniture Industries, Inc. v. *McReynolds*, 261 Va. 897, 224 S.E.2d 323 (1976)	7, 12
Berkovitz v. *United States*, 486 U.S.___, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988)	13, 16, 17
Bradford Electric Light Co. v. *Clapper*, 286 U.S. 145, 52 S. Ct. 571, 76 L. Ed. 1026 (1931)	20
Carroll v. *Lanza*, 349 U.S. 408, 75 S. Ct. 804, 99 L. Ed. 1183 (1954)	18-24
Dominquez v. Figel, 626 F. Supp. 368 (N.D. Ind. 1986)	27
Eash v. *Riggins Trucking, Inc.*, 757 F.2d 557 (3rd Cir. 1985)	27
Garcia v. *Pittsylvania County Service Authority*, 845 F.2d 465 (4th Cir. 1988)	18, 19
Henderson v. *Central Tel. Co. of Virginia*, 233 Va. 377, 355 S.E.2d 596 (1987)	8-11
Home Indemnity Company of New York v. Poladian, 270 F.2d 156 (4th Cir. 1959)	18, 19
Indian Towing Co. v. *United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955)	i, 6, 12
Itel Containers International v. *Puerto Rico Marine Management*, 108 F.R.D. 96 (D.N.J. 1985) . . .	27

McCann v. Newport News Shipbuilding and Dry Dock Company, 177 F.Supp. 909 (E.D. Va. 1959) 18, 19

Olga's Kitchen v. Papo, 108 F.R.D. 695 (E.D. Mich. 1985) 27

Pacific Employers Ins. Co. v. *Industrial Accident Commission of California, et al.* 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939) . . . . . ii, 18-21, 23

Pendley v. *United States*, 856 F.2d 699 (4th Cir. 1988) 1, 8, 10, 14

Rayonier, Inc. v. United States, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957) . . . . . i, 7, 8, 10, 12

Shell Oil Co. v. *Leftwich*, 212 Va. 715, 187 S.E.2d 162 (1972) 7, 8, 9, 11, 12

Thomas v. *Washington Gas Light Co.*, 448 U.S. 261, 100 S. Ct. 2647, 65 L. Ed.2d 757 (1980) . . . . . ii, 20-24

Vandergrift v. *United States*, 500 F. Supp. 237 (E.D. Va. 1978), *aff'd* w/ opinion, 634 F.2d 628 (4th Cir. 1980) 11, 12

Williams v. *Gresham Co.*, 201 Va. 457, 111 S.E.2d 498 (1959) 8, 12

STATUTES

Federal

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1346(b) 2, 12

28 U.S.C. Section 1927 . . . . . ii, 6, 25-28

28 U.S.C. Section 2671, *et seq.* "Federal Tort Claims Act" . . . . . i, ii, 2, 4-7, 9, 11-17, 19, 22, 23, 25, 27, 28, 29

28 U.S.C. Section 2674 12

28 U.S.C. Section 2675(a) 4

Virginia

Code of Virginia, Section 65.1-29 . . . . . 10, 12

Code of Virginia, Section 65.1-34 14

Workers' Compensation Act . . . . . i, 5, 7, 14, 19, 22, 23

California

Workers' Compensation Act . . . . . i, ii, 20, 22, 23

UNITED STATES CONSTITUTION

Article 4, Section One "Full Faith and Credit Clause" . . . . . ii, 5, 6, 18, 20, 23, 24, 28, 29

FEDERAL RULES OF CIVIL PROCEDURE

Rule 11 . . . . . ii, 6, 25-29

OTHER AUTHORITIES

Professor Arthur Larson, *The Law of Workmen's Compensation* (1976), Vol. 2A, Section 72.50 23

No.

IN THE

Supreme Court Of The United States

October Term, 1988

WILLIAM PERRY PENDLEY, ADMINISTRATOR
TO THE ESTATE OF LEON H. CASSUTT, DECEASED,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit").

OPINION BELOW

The Opinion of the Fourth Circuit is reported as *Pendley* v. *United States*, 856 F.2d 699 (4th Cir. 1988) ("*Pendley*"), and is reprinted in the appendix ("App.") hereto. App. 1a. The Order of the Fourth Circuit denying Petitioner's Petition for Rehearing and Petition for Rehearing *en banc* has not been reported; it is reprinted in the appendix hereto. App. 9 a.

The Order of the United States District Court for the Eastern District of Virginia, Alexandria Division, dismissing this action

has not been reported; it is reprinted in the appendix hereto. App. 7a.

JURISDICTION

The judgment of the Fourth Circuit was entered on September 19, 1988. App. 1a. A petition for rehearing was denied on October 14, 1988. App. 9a. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves the Federal Tort Claims Act ("FTCA"), 28 U.S.C. Section 2671, *et seq.*, and 28 U.S.C. Section 1346(b). These statutes are reproduced in the appendix. App. 18a-19a.

STATEMENT OF THE CASE

This is an action brought by Petitioner, as Administrator for the Estate of the late Leon H. Cassutt, against the United States of America, for the death of Leon H. Cassutt on September 19, 1985. The jurisdiction of the district court was invoked under the FTCA, 28 U.S.C. Section 2671, *et seq.*, and 28 U.S.C. Section 1346 (b).

On September 19, 1985, the late Leon H. Cassutt, a citizen of the State of California, in the employ of The Aerospace Corporation, a California Corporation, licensed to do business in the State of California and doing its principal business in the State of California, was in the Commonwealth of Virginia within the scope of his employment with The Aerospace Corporation, pursuant to a contract between the United States Air Force, through the United States Air Force Space Division ("AFSD") in Los Angeles, California, and The Aerospace Corporation ("the 0084 contract"). The AFSD customarily and normally contracted with The Aerospace Corporation to have employees of The Aerospace Corporation conduct "technical surveillance" of certain specified other contractors performing work for the United States Government because of the unique skills and abilities of The Aerospace Corporation and its employees.

On September 19, 1985, the late Leon H. Cassutt was in one of the facilities of Atlantic Research Corporation ("ARC"), to wit: Building 234, Pine Ridge Plant, Gainesville, Virginia, for the purpose of conducting, on behalf of his employer, The Aerospace Corporation, "technical surveillance" of certain specific activities in which ARC was engaged, that is, work underway pursuant to a separate contract between the AFSD in Los Angeles, California, and Vought Corporation ("the 0041 contract"), with a subcontract thereunder between Vought Corporation and ARC.

In another part of that same Building 234, employees of ARC were engaged in work pursuant to a completely separate contract between the United States Air Force Flight Test Center at Edwards Air Force Base, California ("EAFB") and ARC ("the 0055 contract"). The late Leon H. Cassutt, was in no way involved in any activities relating to the 0055 contract, or the work underway pursuant to that contract in ARC's Building 234. Unbeknownst to the late Leon H. Cassutt--and notwithstanding the fact that the technical surveillance by the late Leon H. Cassutt required him to be in the presence of, at most, only several grams of solid rocket propellant--a total of approximately 250 pounds of solid rocket propellant was being worked on by ARC employees pursuant to other unrelated contracts, including the 0055 contract, in that other part of Building 234.

On the morning of September 19, 1985, as approximately 30 pounds of that 250 pounds of solid rocket propellant were being cut and prepared for testing by ARC employees in that other part of Building 234, it ignited, and then, in less than a minute, that initial ignition and fire caused the instantaneous deflagration (sudden and violent burning) of the entire remaining approximately 220 pounds of solid rocket propellant around it. The deflagration sent a thermal pulse of thousands of degrees through Building 234 at a speed of hundreds of miles an hour, caused an explosion, a fire and killed the late Leon H. Cassutt.

Following the death of the late Leon H. Cassutt, his employer, The Aerospace Corporation, applied, under the Workers' Compensation Act of the State of California, for death

benefits for the widow and children of the late Leon H. Cassutt, which benefits were then begun via monthly payments.[1]

On August 4, 1986, in accordance with the FTCA, in particular 28 U.S.C. Section 2675(a), a "Claim for Damage, Injury, or Death" (Standard Form 95) was filed with the United States Government on behalf of the family and Estate of the late Leon H. Cassutt. In a letter dated February 9, 1987, the United States Government denied that Claim, stating that there could be no recovery under the FTCA because the late Leon H. Cassutt was a "statutory employee of the U.S. Air Force." App. 22a. On February 24, 1987, petitioner filed a Complaint, under the FTCA, in the United States District Court for the Eastern District of Virginia, Alexandria Division.

On May 15, 1987, Petitioner filed a Motion for Partial Summary Judgment as to Liability, a Motion that was granted, in part, as to negligence, when the District Court held, on June 5, 1987:

> that there is a non-discretionary, non-delegable, duty on the part of the defendant to inspect for safety at the site where the decedent's death occurred, and that the failure to so inspect constituted negligence. The issue whether such negligence was the proximate cause of the decedent's death and the issue of damages shall remain for the fact finder.[2]

---

[1] On December 3, 1986, on the first day of a separate trial against ARC for the wrongful death of the late Leon H. Cassutt, the Administrator of the Estate agreed not to sue ARC in exchange for $500,000.00. Following that agreement, in accordance with California law, The Aerospace Corporation's workman's compensation insurer terminated the monthly death benefit payments being made under the California Workers' Compensation Act to Mrs. Leon H. Cassutt.

[2] During the course of discovery, Petitioner, through counsel, took the *de bene esse* deposition of Mr. Marvin N. Goodman, the United States Government's own safety specialist, who, had he been advised by the Government of the existence of the rocket propellant contracts involved herein, was the person the Government would have assigned to inspect ARC's Building 234. Mr. Goodman, after having reviewed various official documents and reports of the incident of September 19, 1985, testified that there were numerous safety violations in Building 234 (including the absence of any fire alarm system), that had the Government inspected Building 234 as it should have but hadn't, the violations were so patent that he would have easily detected them, that he would have required that the safety viola-

On July 24, 1987, Respondent filed a Motion for Summary Judgment asserting that the United States Government was a statutory employer of Petitioner's decedent under the Virginia Workers' Compensation Act and that the United States District Court, therefore, lacked jurisdiction. Following oral arguments on July 31, 1987, the United States District Court dismissed Petitioner's action. Petitioner's Motion for Reconsideration and Motion for Appropriate Sanctions were denied.

On September 19, 1988, the Fourth Circuit affirmed the decision of the United States District Court. The Fourth Circuit held that since full faith and credit could not be given to the California Workers' Compensation Act as a result of decisions of this Court, the Virginia Workers' Compensation Act was applicable. In addition, in applying the Virginia Act, the Fourth Circuit applied a test used by the Virginia Supreme Court for "public utilities and government entities" to determine whether the United States was the "statutory employer" of the late Leon H. Cassutt.

REASONS FOR GRANTING THE WRIT

Summary

This decision of the Fourth Circuit is in direct and apparent conflict with the precedents and prior holdings of this Court requiring that the United States be liable "as a private individual." The decision of the Fourth Circuit is also in direct conflict with another decision of the Fourth Circuit, and with decisions of the Supreme Court of the Commonwealth of Virginia as to the statutory employer "trade, business, or occupation" test to be applied to the United States. This decision of the Fourth Circuit adversely impacts important national interest issues, as well as the implementation of the Federal Tort Claims Act, and the jurisdic-

---

tions be corrected or the Building closed, and that, in his expert opinion, had those violations been corrected, either the fire that led to the death of Mr. Cassutt of September 19, 1985, would not have occurred or if it had occurred, the safety devices would have permitted all in the building–including the late Leon H. Cassutt–to survive. Nothing contrary to Mr. Goodman's expert opinion appears anywhere in the record.

tion of federal district courts. The decision is also so clearly erroneous as to threaten to weaken seriously the FTCA, an important federal statute.

In addition, the decision of the Fourth Circuit conflicts, in principle, with decisions of this Court regarding the application of conflicting workers' compensation statutes, as well as the application of the Full Faith and Credit Clause of the United States Constitution.[3]

Finally, this decision conflicts, in principle, with the decisions of this Court and at least one Court of Appeals, regarding sanctions under Rule 11, and 28 U.S.C. § 1927.

I. The Fourth Circuit, In Direct Conflict With The Holdings Of This Court, Erroneously Applied The Rulings Of The Supreme Court Of The Commonwealth Of Virginia By Applying To The United States Government A Test Reserved By The Virginia Supreme Court For State Government Entities And Public Utilities, Rather Than The Correct Test Under The FTCA, The One Applied By The Virginia Supreme Court To Private Individuals.

A. The Federal Tort Claims Act And This Court's Prior Holdings Require That The United States Be Held "Liable . . . As A Private Individual."

The requirements of the FTCA that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances,"[4] has caused this Court to reject the Government's efforts to read the FTCA:

> as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person. . . . The Federal Tort Claims Act . . . is not self-defeating by covertly embedding the casuistries of municipal liability for torts.[5]

---

[3] Article 4, §1 of the United States Constitution.

[4] App. 18a.

[5] *Indian Towing Co.* v. *United States*, 350 U.S. 61, 65, 76 S. Ct. 122, 124, 100 L. Ed. 48 (1955).

In *Rayonier, Inc.* v. *United States*, this Court reiterated:

> [A]s we recently held in *Indian Towing Co.* v. *United States*, [citation omitted], the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred.[6]

B. Virginia Has Two Alternative Tests For Ascertaining An Entity's Trade, Business, Or Occupation Pursuant To Determining Its Status As A "Statutory Employer" Under The Virginia Workers' Compensation Act And Hence Its Potential Immunity From A Civil Action: One For "Private Individuals" and Another For "Public Utilities and Government Entities."

There are two different and mutually exclusive tests used by the Supreme Court of Virginia to define an entity's "trade, business, or occupation" incident to a determination of whether that entity is a "statutory employer" of a person and hence immune from any action by that person other than under the Virginia Workers' Compensation Act.

The first test is articulated in *Shell Oil Co.* v. *Leftwich*, 212 Va. 715, 187 S.E.2d 162 (1972), where the Virginia Supreme Court held: "[T]he test ... is whether this indispensable activity is, in that business, *normally* carried on through employees rather than independent contractors." *Id.*, 187 S.E.2d at 167. (Emphasis in orginial.)[7]

The second test is found, for example, in *Henderson* v. *Central Telephone Co.*, 233 Va. 377, 355 S.E.2d 596 (1987), where the Virginia Supreme Court held: "in cases involving *government entities*,

---

[6] 352 U.S. 315, 318-19, 77 S. Ct. 374, 376-77, 1 L. Ed. 2d 354 (1957).

[7] The *Shell* test was previously applied in *Bassett Furniture Industries, Inc.* v. *McReynolds*, 261 Va. 897, 224 S.E.2d 323 (1976), and is sometimes referred to here as the *Shell/Bassett* test.

we have consistently considered the laws under which they were created and under which they functioned in determining their trade, business or occupation." *Id.*, 355 S.E.2d at 600F. (Emphasis added.)[8]

C. The Fourth Circuit, In Direct And Apparent Conflict With This Court's Prior Holdings And Precedents, Erroneously Applied The "Government Entity" Statutory Employer Test To The United States.

Notwithstanding this Court's prior holdings and precedents requiring that the United States be liable "as a private individual" and notwithstanding the clear holding of the Virginia Supreme Court that "a private business entity is essentially self-defining in terms of its trade, business, or occupation,"[9] the Fourth Circuit here erroneously applied the "government entities" test of *Henderson* to defendant United States. The Fourth Circuit did so, in part, apparently as a result of its erroneous conclusion that the Virginia Supreme Court in *Henderson* applied the government entity test to "the *private* corporate telephone company."[10]

---

8 The *Shell Oil Co.* test has never been applied by this Court in a case involving either a *public utility* or a *governmental entity*. . . . [The *Shell Oil Co.* test] works best in cases involving *private businesses* because those entities often define their trade, business, or occupation by their conduct. With regard to *such [private individual] entities*, what they do on a day-to-day basis provides a reasonably reliable indication of their trade, business or occupation. Yet, public utilities and government entities are of another class.

Henderson, 355 S.E.2d at 599. (Emphasis added.) The *Henderson* test was previously applied by the Virginia Supreme Court in *Anderson* v. *Thorington Construction Co.*, 201 Va. 266, 110 S.E.2d 396 (1959), and *Williams* v. *Gresham Co.*, 201 Va. 457, 111 S.E.2d 498 (1959) and is sometimes referred to here as the *Henderson/Anderson/Williams* test.

9 *Henderson*, 355 S.E.2d at 599.

10 *Pendley*, 856 F.2d at 702. (Emphasis in original.) According to the Fourth Circuit: "The trade, business, or occupation of the Air Force is no less governed by statute and regulation than was that of the *private* corporate telephone company in *Henderson*." App. 5a.

In fact, the Virginia Supreme Court did not apply the "government entities" test to Continental Communications Construction Company, the *private* corporation which was the employer of the plaintiff Henderson, but instead applied that test to Central Telephone Company of Virginia (*Centel*), which was:

> a *public* utility regulated by the laws of the Commonwealth and subject to the administrative control of the State Corporation Commission. *Centel* is required by statute to provide 'adequate service and facilities'.[11]

The trade, business or occupation of the private corporation in *Henderson* was never the subject of any inquiry by the Virginia Supreme Court. Nevertheless, the Virginia Supreme Court made it clear in *Henderson* that with regard to private businesses the test is "whether this indispensable activity is, in the business, *normally* carried on through employees rather than independent contractors."[12] As noted, the Virginia Supreme Court drew a fundamental distinction between "a private business entity" whose trade, business or occupation is "essentially self-defining," and a "public utility" which has "duties, obligations, and responsibilities imposed upon it by statute, regulation, or other means."[13]

After reading *Henderson* and the instant opinion of the Fourth Circuit, the only conclusion one can reach is that there are two alternative tests in Virginia: one for private individuals or businesses, and another for public utilities and government entities,[14] and that the Fourth Circuit erroneously applied to the United States Government, in a Federal Tort Claims Act lawsuit, the test reserved for "public utilities and government entities" and not the test reserved for private individuals or businesses, as was required by the FTCA. Such an application is in direct and apparent conflict with the precedents and prior holdings of this Court.

---

[11] *Henderson*, 355 S.E.2d at 597. (Emphasis added.)

[12] *Henderson*, 355 S.E.2d at 599, *quoting Shell Oil Co.*, 187 S.E.2d at 167. (Emphasis in original.)

[13] *Henderson*, 355 S.E.2d at 600.

[14] *Henderson*, 355 S.E.2d at 599.

D. The Decision Of The Fourth Circuit Is In Direct Conflict With The Decisions Of The Supreme Court Of The Commonwealth Of Virginia.

As is apparent from the above discussion, the Fourth Circuit is totally in error when it concludes that:

> We think it is clear that in Virginia, under *Henderson*, if a private individual operates a business regulated by statute or regulation, what is "a part of his trade, business or occupation" is determined by the statutes and regulations under which he operates. Thus, the Air Force as a private individual, operating under statutes and regulations as it does in the development of space weapons systems, is no less an employer under Va. Code Section 65.1-29 than was the private telephone company operating under statutes and regulations in *Henderson*.[15]

What is "clear" is that the Virginia Supreme Court has developed a government entities statutory employer test, and that

---

[15] *Pendley*, 856 F.2d at 702. App. 5a-6a. The error of the Fourth Circuit is further exacerbated by the second sentence above. Contrary to the unsupported statement of the Fourth Circuit, the private telephone company in *Henderson* was an employer operating not "under statutes and regulations" but under the terms and conditions of its contractual agreement with the public utility telephone company in *Henderson*. According to the Virginia Supreme Court, the private telephone company is self-defining by what it does on a day-to-day basis, while the trade, business, or occupation of the public utility telephone company is determined by duties imposed upon it by statute and regulation.

The analysis of the Fourth Circuit is further flawed since nearly every business in Virginia is, in some way, "regulated by statute or regulation." The natural extension of the instant Fourth Circuit opinion that the *Henderson* test could be applied to every private business that "operates a business regulated by statute or regulation," would cause its application to nearly every business, including the Shell Oil Company. That obviously is not the intention of the Virginia Supreme Court.

it was that test that was misapplied to the United States by the Fourth Circuit.[16]

Thus, there exists a direct conflict between the Fourth Circuit and the Supreme Court of the Commonwealth of Virginia concerning an important federal question, that is, the manner in which the Federal Tort Claims Act is to be applied in the Commonwealth of Virginia. The conflict between the Fourth Circuit and the Supreme Court of Virginia relates to the validity, construction, and application of the Federal Tort Claims Act, and adversely affects the rights and privileges of those injured or killed by the negligence of the United States Government and thus entitled to the benefits of that Act.

E. The Decision Of The Fourth Circuit Is In Conflict With Another Decision On The Very Same Issue By A Different Panel Of The Fourth Circuit

In *Vandergrift* v. *United States*, 500 F. Supp. 237 (E.D. Va. 1978), *aff'd* w/opinion, 634 F.2d 628 (4th Cir. 1980),[17] the argument of the United States that the United States was the statutory employer of the deceased--killed while working at a National Aeronautics and Space Administration ("NASA") facility in Virginia--was rejected by the United States District Court for the Eastern District of Virginia, at Norfolk. The District Court, applying the *Shell/Bassett* test, held that the deceased was not engaged in work that was a part of the trade, business or occupation of NASA.

On appeal, the United States argued that the *Shell/Bassett* test was for "a private owner, and that the court should apply two Virginia precedents involving public bodies, *Anderson* v. *Thorington Construction Co.*, 201 Va. 266, 110 S.E.2d 396 (1959)

---

16 Moreover, in cases involving *government entities*, we have consistently considered the laws under which they were created and under which they functioned in determining their trade, business, or occupation.

Henderson, 355 S.E.2d at 600. (Emphasis added.)

17 The unpublished opinion of the Fourth Circuit is reprinted in the appendix hereto. App. 10a.

and *Williams* v. *Gresham Co.*, 201 Va. 457, 111 S.E.2d 498 (1959)."[18]

The Fourth Circuit rejected the Government's argument in *Vandergrift* and concluded:

> We find it unnecessary to determine whether the Virginia Supreme Court has created separate standards under Section 65.1-29 for private and public owners, because even if the United States is correct *we must look to the state law governing the liability of a private person* in an FTCA action. 28 U.S.C. Sections 1346(b), 2674. *See generally Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957); *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). The district court correctly relied on *Bassett*.[19]

While the Fourth Circuit based its opinion in the instant matter upon the more recent decision of the Virginia Supreme Court in *Henderson*, as noted above, *Henderson* was just a reiteration of the Virginia Supreme Court's previously articulated *Anderson/Williams* statutory employer test to be applied to government entities. However, the Virginia Supreme Court has never applied the government entities test (*Henderson/Anderson/Williams*) to a private individual or private business but only to government entities. To private individuals and private businesses, the Virginia Supreme Court applies the *Shell/ Bassett* test.

Therefore, in *Vandergrift*, the Fourth Circuit held that the *Henderson/Anderson/Williams* statutory employer test was *not* to be applied to the United States in a FTCA case, but instead the *Shell/Bassett* statutory employer test was the appropriate test because the FTCA requires the Court to look to the state law governing the liability of a private person. However, in the instant FTCA case, the Fourth Circuit used the *Henderson/Anderson/Williams* test instead of the *Shell/Bassett* test.

---

[18] *Id.*, at App. 11a.

[19] *Id.* (Emphasis added.)

Since the two decisions are in direct conflict with each other, and since the conflict relates to several recurring and important issues--including the jurisdiction of federal district courts, the salubrious effects of the Federal Tort Claims Act (in preventing injury and death while simultaneously providing remedies for both) and rights and privileges under a federal statute--this Court should grant certiorari.

F. The Important Role Of The Federal Tort Claims Act, In Promoting Safety Within The United States Government, While Simultaneously Providing Compassionate Relief To Those Injured By The Actions Of The Government, Is Seriously Undermined By The Decision Of The Fourth Circuit.

The Federal Tort Claims Act represents a compact by the United States Government with the American people that it will relinquish some of its sovereign immunity in order to seek to ensure that its agents and employees operate in a safe manner, and that if they do not, and as a result, negligently cause injury or death, the victims will be provided a remedy against the United States as the tortfeasor's employer. This compact is one of fundamental fairness and equity, and truly reflects the manner in which American people expect their Government--regardless of its size, pervasiveness, and power to do generally as it wishes--to treat its citizens.

Yet it is more. The Federal Tort Claims Act is a decision by the Congress to hold the Government accountable for its negligence in the same manner as a private individual. At least part of the reason--in addition to assuring compensation to victims--is to induce, in government officials, a sensitivity for the safety of others.

It is, as well, something the American people justifiably expect of their government; whether for example, in the Government's regulation of the production of polio vaccine, *Berkovitz* v. *United States*, 486 U.S. __, 108 S. Ct. 1954, 100 L. Ed.2d 531 (1988), or, as in the instant matter, in the regulation of solid rocket propellant research and development, production and test-

ing facilities. Regardless of the nature of the activities in which the United States Government engages, the American people should be able to rely on the fact that our Government will act reasonably to prevent harm to its citizens, and, if harm should occur due to the negligence of its employees, compensation will be provided.

Considering the historical nature and importance of this compact, and the positive effect it has--both on the conduct of Government employees, and the view of private citizens of the balanced compassion of their Government--the decision of the Fourth Circuit does significant injury to the Federal Tort Claims Act and what it is meant to achieve. For notwithstanding the stated objective of the Fourth Circuit's decision--"to give the Worker's Compensation Act its full remedial purpose," and "to effectuate the remedial purpose of the Worker's Compensation Act,"[20]--the Fourth Circuit's decision now deprives injured workers and families of deceased workers of *any* remedy in the Commonwealth of Virginia, under either the FTCA or the Virginia Workers' Compensation Act.

Although the Virginia Workers' Compensation Act permits a workman to recover compensation under the Act from either "the principal contractor" or "a subcontractor,"[21] under the doctrine of sovereign immunity, the Virginia Industrial Commission has no jurisdiction over the Air Force. Therefore, contrary to the Fourth Circuit's words, neither the instant Administrator, nor any other Administrator nor any injured worker, can recover from the United States as the "statutory employer" of the late Leon H. Cassutt. Since the Commonwealth of Virginia has no jurisdiction over the United States under the Virginia Workers' Compensation Act, the "remedial purposes" of that statute under the Fourth Circuit's instant opinion are rendered null and void.

The future impact of the Fourth Circuit's erroneous interpretation is significant, since if the decision is allowed to stand, employees of private businesses--businesses engaged by the

---

[20] *Pendley*, 856 F.2d 699 at 702. App. 5a

[21] Code of Virginia, Section 65.1-34. App. 21a.

United States Government as independent contractors--who are injured or killed by the negligent conduct of United States Government employees, will be deprived of the relief meant to be provided to them by Congress by its adoption of the Federal Tort Claims Act. The Fourth Circuit's view is not limited in its application to the Commonwealth of Virginia, but instead the potential impact of this interpretation goes far beyond the borders of Virginia.[22]

One of the major employers in Virginia is the United States Government. There are hundreds of United States Government facilities throughout the Commonwealth of Virginia, all of which are serviced by the work of independent contractors, and their employees. In addition, men and women from throughout the United States travel to Virginia to perform work on behalf of their employers who, in turn, have been employed by the United States Government as independent contractors. This is particularly the case in the Northern Virginia area.

If the Fourth Circuit's opinion is allowed to stand, the negligently inflicted injury or death of these employees, suffered at the hands of United States Government employees, would fall outside the remedial provisions of the Federal Tort Claims Act. Yet not only would the injured or killed workers, and their families, be adversely affected by such a result, but so too would all Americans by the knowledge that an erroneous interpretation of Virginia law has rendered citizens not only vulnerable to the negligence of the United States Government but vulnerable without any remedy.

Unlike any other entity that raises the statutory employer defense in a civil suit, if the United States is found to be a statutory employer, as it was here, the plaintiff does not become a petitioner before a state workers' compensation commission. Instead, the plaintiff has *no* remaining remedy against the negligent United

---

[22] The fact pattern that occurred here, *i.e.*, visitor from a State that did not authorize a statutory employer defense injured or killed in a State that did authorize a statutory employer defense is much broader than just a Californian visiting Virginia. It has been estimated that approximately 15 States do not authorize a statutory employer defense while the remaining States do.

States. Such a result clearly is opposite to the public policies that justify the FTCA.

The importance of this significant federal statute, and the importance of the public policy issues which surround its implementation and interpretation, necessitate that certiorari be granted and that this aberrant decision of the Fourth Circuit be reversed.

G. The Decision Of The Fourth Circuit, Affirming The Denial Of Jurisdiction By The United States District Court In This Matter, Constitutes Such A Departure From The Accepted And Usual Course Of Judicial Proceedings Regarding The Federal Tort Claims Act As To Call For An Exercise Of This Court's Power Of Supervision.

As noted above, the decision of the Fourth Circuit is in direct and apparent conflict with the precedents and prior holdings of this Court as to the manner in which the United States is to be held liable, that is, "as a private individual." The Fourth Circuit, in its erroneous decision, has affirmed the denial by the District Court of its jurisdiction to provide relief under the Federal Tort Claims Act. Such a denial of jurisdiction, particularly when it is based upon an interpretation of federal statute that is in conflict with the holdings of this Court, calls for an exercise of this Court's power of supervision.

H. The Erroneousness Of The Fourth Circuit's Decision Constitutes A Subtle Erosion Of The Remedies Meant To Be Available, Under The Federal Tort Claims Act, To Individuals Injured Or Killed By The Negligent Conduct Of The United States.

In *Berkovitz* v. *United States*, *supra*, this Court declined to permit the erosion of the Federal Tort Claims Act through the subtle expansion of the "discretionary function exception," an exception that would have soon swallowed the rule.

The obviously incorrect application of the Federal Tort Claims Act by the Fourth Circuit here not only constitutes a gross

miscarriage of justice, but concerns an important and recurring statutory problem, that is, the future viability of the Federal Tort Claims Act. While the Court has stanched the flow of the life's blood out of the FTCA through the "discretionary function exception" by its decision in *Berkovitz*, if the instant Fourth Circuit decision is allowed to stand, the "statutory employer" exemption will become a gaping wound through which the United States will improperly escape any liability for the deaths, injuries and suffering negligently inflicted by its employees. Therefore, since no state workers' compensation commission has jurisdiction over the United States, the United States, as a matter of law, should not be able to raise the affirmative defense of "statutory employer" in a FTCA civil action.

This erroneous ruling will thus threaten the effectiveness of the Federal Tort Claims Act as a means of inducing safety conscious conduct by the United States Government, and as a vehicle for providing relief to those negligently injured or to the families of those killed. If permitted to stand, the Fourth Circuit decision will threaten the safety of thousands of men and women who perform work--as employees of independent contractors--for the United States Government in the Commonwealth of Virginia and elsewhere, and will further deny the relief legally due them or their families under the Federal Tort Claims Act, should they be injured or killed.[23]

---

[23] For example, prior to the decision of this Court in *Berkovitz*, *supra*, the United States Government in the instant proceeding asserted at the District Court that it had no responsibility for safety, and that its only responsibility was for timely completion of the project, notwithstanding its promulgation of a detailed Government safety manual containing mandatory safety standards for the manufacture of rocket propellant, as well as the promulgation of a Government inspection manual requiring quarterly safety inspections by federal officials of all rocket propellant facilities to ensure compliance with the safety manual. That position was rejected by the United States District Court. Despite the Government's urgings, the Fourth Circuit--no doubt in response to *Berkovitz*--declined to disturb the District Court's holding finding the United States Government negligent here as a matter of law.

In fact, as shocking as it seems, and notwithstanding the District Court's holding finding the United States negligent as a matter of law, the Government's ad-

II. The Fourth Circuit Erroneously Declined To Utilize The Workers' Compensation Act Of The State Of California In Determining Whether The United States District Court Possessed Jurisdiction To Hear A Petitioner's Federal Tort Claims Act And Thereby Denied To The State Of California Full Faith And Credit For The Statute Which California Enacted To Provide Relief To An Employee For Injuries Occurring Elsewhere When The Contract Of Employment Was Entered Into In California.

A. The Decision Of The Fourth Circuit Is In Direct And Apparent Conflict With the Precedents And Prior Holdings Of This Court Relative To The Manner In Which A Decision Is Made Between The Workers' Compensation Statutes Of Two States Each Of Which Has An Arguable Interest In The Matter.

The Fourth Circuit, by its reference to *Garcia* v. *Pittsylvania County Service Authority*, 845 F.2d 465 (4th Cir. 1988), appears to have based its refusal to apply the California Workers' Compensation Act upon the decisions of this Court in *Pacific Employers Ins. Co. v. Industrial Accident Commission of California, et al.*, 306 U.S. 493, 59 S. Ct. 629, 83 L.Ed. 940 (1939) and *Carroll* v. *Lanza*, 349 U.S. 408, 75 S.Ct. 804, 99 L.Ed. 1183 (1954). However, the Fourth Circuit's reasoning in *Garcia* has no application to the instant case.[24] In fact, for the Fourth Circuit to base its decision here

---

ministrative system which allowed the required safety inspections to be completely neglected—over a three year period none of the twelve required quarterly safety inspections were ever conducted—has never been corrected.

[24] In addition, by its reference to *Garcia*, the Fourth Circuit appears to have based its refusal to apply the California Workers' Compensation Act, in part, upon *Home Indemnity Company of New York* v. *Poladian*, 270 F.2d 156 (4th Cir. 1959) and *McCann* v. *Newport News Shipbuilding and Dry Dock Company*, 177 F. Supp. 909 (E.D. Va. 1959). However, the Fourth Circuit's reading of both *Home Indemnity* and *McCann* is in error:

> We are thus of opinion that the law of Virginia controls for this accident which occurred in Virginia and was occasioned by the negligence of an independent contractor with the [Pittsylvania County {Virginia}

on *Pacific Employers* and *Carroll* is to turn each of those cases on their head by denying not only relief under the Federal Tort Claims Act, but also, the Virginia Workers' Compensation Act.[25] In addition, to apply *Garcia* here reflects a total misunderstanding of this Court's decisions in *Pacific Employers* and *Carroll*, and the underlying reasons for those decisions. As this Court stated in those decisions, to rule in any other way than the Court did "would create

---

> Service] Authority who was doing work in Virginia and *required by Virginia law to have workers' compensation insurance.*

Garcia, 845 F.2d at 467. (Emphasis added.) While this analysis may have some applicability to *Garcia*, it is totally inapplicable to the instant matter. All three contracts in the instant matter were entered into in the State of California. Virginia did not require, nor could it have required, that the United States purchase worker compensation insurance. The Aerospace Corporation, the employer of the late Leon H. Cassutt, had worker compensation insurance under California law.

In addition, in *Home Indemnity*, the defendant general contractor was a Virginia general contractor who neither resided in nor did business in the foreign jurisdiction, that is, the residence of the plaintiff and his employer. Recognizing the critical importance of those facts in determining which State's law should govern, the Fourth Circuit declared:

> Much can be said for the proposition that when all the parties reside and make their employment and insurance arrangements in a certain place, they have it in contemplation that the law of that place shall govern their relationships, rather than *the purely adventitious circumstance that an injury may occur in another place.*

Id., at 159. Yet in the instant matter, the Air Force was a "general contractor" in the State of California--not Virginia like the general contractor in *Home Indemnity*--and entered into all three of the applicable contracts in California. Thus, the Virginia factual underpinnings for *Home Indemnity* do not exist in the instant matter.

Further, the decision in *McCann* is the result of a totally different factual situation than here. In *McCann*, defendants were Virginia corporations that were required by Virginia law to carry worker compensation insurance. In the instant case Virginia law does not, and could not require the United States to carry worker compensation insurance and *all* events, save the tragic death of the late Leon H. Cassutt, occurred in California.

[25] As previously discussed supra, under the doctrine of sovereign immunity, the Industrial Commission of Virginia has no authority over the United States.

an impasse which would often leave the employee remediless," [26] and would "make relief by way of workmen's compensation the exclusive remedy."[27]

Pacific Employers, and later *Carroll*, does not permit, let alone compel, the Fourth Circuit to refuse to apply the California Workers' Compensation Act in this FTCA case (involving as it does, a California citizen, a California employer, a contract executed in California between that California employer and a California-based division of the United States Air Force, and death benefits awarded under the California Workers' Compensation Act). In fact, this Court has refused consistently to engage in such a "rigid and literal enforcement of the full faith and credit clause."[28]

Instead, *Pacific Employers*, *Carroll*, and more recently *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 100 S. Ct. 2647, 65 L. Ed.2d 757 (1980), require the Court to determine whether the statute to which full faith and credit is sought to be given is "obnoxious" to the policies of the forum state,[29] or reflects "a conflicting and opposed policy."[30] Such a determination is made, in part, by a "flexible balancing of the respective States' interests."[31] This Court, rather than adhere by rote to a rule favoring either the state of residence/employment or the state of the injury/death, has instead engaged in a balancing of the interests of the states involved. For as Justice Douglas wrote in *Carroll* v. *Lanza*:

> [The state's] interests are large and considerable and are to be weighed not only in the light of the facts of this case but by the kind of situation presented. For we

---

[26] *Pacific Employers*, 306 U.S. at 501-02.

[27] *Carroll*, 349 U.S. at 412-13.

[28] *Pacific Employers*, 306 U.S. at 501.

[29] *Bradford Electric Light Co.* v. *Clapper*, 286 U.S. 145, 161, 52 S. Ct. 571, 76 L. Ed. 1026 (1931), and *Pacific Employers*, 306 U.S. at 504.

[30] *Carroll* 349 U.S. at 412.

[31] *Thomas*, 448 U.S. at 279, note 24, discussing this Court's decisions in *Bradford Electric Co.*, and *Pacific Employers*. This Court, in *Carroll*, held that such interests were to be "weighed." *Carroll*, 349 U.S. at 413.

write not only for this case and this day alone, but for this type of case.[32]

In *Pacific Employers* while permitting California to award worker's compensation benefits, this Court found the policies of the worker's home state of Massachusetts--which would have prevented such an award--to be "obnoxious" to the policies of California.[33] In *Carroll*, while permitting an injured worker to maintain a common law action in Arkansas against a third party--an action which he could not have maintained in his home state of Missouri--this Court found that Arkansas was "not adopting any policy of hostility to the public Acts of Missouri," since Arkansas was seeking only to give "affirmative relief."[34] Finally, in *Thomas* while permitting an injured worker to recover workers' compensation benefits from two states (first from Virginia and then from the District of Columbia), this Court, in balancing the interests of Virginia and the District of Columbia, concluded that the only interest which Virginia had in opposing the successive awards was "not of controlling importance."[35] In fact, this Court concluded

---

[32] *Carroll*, 349 U.S. at 413. As this Court noted in *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U.S. 532, 547, 55 S. Ct. 518, 79 L. Ed. 1044 (1934):

> [T]he conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.

[33] *Pacific Employers*, 306 U.S. at 504.

[34] *Carroll*, 349 U.S. at 413.

[35] *Thomas*, 448 U.S. at 280: "It follows that a State's interest in limiting the potential liability of businesses within the State is not of controlling importance." This Court also held:

> As we have already noted, Virginia also has a separate interest in placing a ceiling on the potential liability of companies that transact business within the State. But past cases have established that that interest is not strong enough to prevent other States with overlapping jurisdiction over particular injuries from giving effect to their more generous compensation policies when the employee selects the most favorable forum in the first instance.

Id., 448 U.S. at 284.

that Virginia--as the cite of the accident--had an "interest in providing adequate compensation to the injured worker."[36]

Given the facts of the instant matter,[37] the Fourth Circuit was in clear and apparent conflict with the precedents and prior holdings of this Court when the Fourth Circuit refused, first, to affirmatively determine that the application of the California Workers' Compensation Act in the FTCA in Virginia was not "obnoxious" to the policies of Virginia, and second, having determined that the California Act was not "obnoxious" to the policies of Virginia, to require the use of the California Workers' Compensation Act for determining the status of the United States, a determination, given the California Act, that would have given the United States District Court jurisdiction and would have permitted this action to be maintained.[38]

Not only was the Fourth Circuit not precluded from giving full faith and credit to the California Workers' Compensation Act, but the precedents and holdings of this Court mandated that full faith and credit be given to the California Workers' Compensa-

---

[36] *Id.*

[37] There can be no question but that there was overlapping workers compensation jurisdiction in the instant matter between California and Virginia. As noted, all events related to this case--save the death of the late Leon H. Cassutt--including the application for, award and receipt of workers' compensation death benefits, occurred in California.

[38] As this Court held in *Carroll*--a decision upon which the Fourth Circuit supposedly based its opinion--Virginia has an interest in ensuring the award of affirmative relief to a worker injured in Virginia. Given that interest, application of the California Workers' Compensation Act is required. For only the application of the California Act--if the Fourth Circuit's erroneous statutory employer interpretation of the Virginia Workers' Compensation Act stands--will permit the widow and family to recover for the negligence of the United States.

Rather than protecting the interests of Virginia, the Fourth Circuit here is harming the interests of Virginia. As this Court noted in *Thomas*, Virginia has an interest in ensuring that injured workers receive compensation. If the Fourth Circuit decision is permitted to stand, citizens of the Commonwealth of Virginia, and all who come to work in Virginia--if negligently injured or killed by employees of the United States--will have no right to compensation from the United States as a result of that negligence--either through the Virginia Workers' Compensation Act or the Federal Tort Claims Act.

tion Act. Further, the principles enunciated by this Court--to ensure relief for injured workers--mandates such full faith and credit.[39] The result, as it now stands, that the injured, and the widows and the widowers and their families have no remedy against the negligent United States, is "obnoxious" to the policies of California, and the California Workers' Compensation Act and as such should not be permitted to stand.

In addition, since the Fourth Circuit decision allows the negligent United States to escape all liability, including the workman's compensation forum, it is "obnoxious" to the policies of Virginia, and the Virginia Workers' Compensation Act, and as such should not be permitted to stand.

Thus, the Fourth Circuit's decision is in direct and apparent conflict with the precedents and holdings of this Court in such decisions as *Pacific Employers*, *Carroll*, and *Thomas* justifying the granting of certiorari here.

B. The Decision Of The Fourth Circuit Conflicts, In Principle, With the Precedents And Prior Holdings Of This Court In Which This Court, In Determining The Applicability Of The Full Faith And Credit Clause, Has Permitted Recovery By The Injured Worker.

The decision by the Fourth Circuit not to apply the Full Faith and Credit Clause, or to apply it in a manner prohibiting the maintenance of a FTCA civil action against the United States, is in conflict, in principle, with the prior holdings of this Court. In *Pacific*

---

[39] As Professor Larson has stated:

> [T]here is no strong reason of compensation policy for destroying common law rights . . . [and] every presumption should be on the side of preserving those rights, once basic compensation protection has been assured . . . . The injured employee has a right to be made whole--not just partly whole . . . . [A]ll the reasons for making the wrongdoer bear the costs of his wrongdoings still apply, including the moral rightness of this result as well as the salutary effect it tends to have as an incentive to careful conduct and safe work practices.

2A Larson, The Law of Workmen's Compensation (1976) Section 72.50 at pp. 14-95.

Employer, in *Alaska Packers Association*, in *Carroll*, and in *Thomas*, the state statute allowing recovery or the maintenance of a civil action, or both, was always applied under the Full Faith and Credit Clause.[40]

C. The Decision Of The Fourth Circuit, Involving As It Does Important Issues Of The Interpretation Of The Federal Tort Claims Act, Especially As It Relates To The Full Faith And Credit Clause Of The Constitution, And Further Involving The Matter Of The Jurisdiction Of Federal District Courts, Merits The Granting Of Certiorari.

By refusing to apply the Full Faith and Credit Clause--that is, by refusing to balance the various interests of the State of California and the Commonwealth of Virginia, in accordance with the holding of this Court in *Thomas*--the Fourth Circuit has failed to protect California's superior interests here in accordance with the Constitution. In addition, by so doing, the Fourth Circuit has denied to the survivors of a California worker, the rights they would have possessed under California law to maintain an action under the Federal Tort Claims Act. Finally, by its erroneous application of Virginia law, the Fourth Circuit has diminished the

---

[40] In *Pacific Employers*, a Massachusetts resident, working for a Massachusetts employer, while working and injured in California was permitted to recover in California. In *Alaska*, a California resident, employed in California, but working and injured in Alaska, was permitted to recover in California. In *Carroll*, a Missouri resident, working for a Missouri employer, was injured in Arkansas, and despite his recovery of worker compensation in Missouri, and a prohibition against third party civil actions in Missouri, was able to maintain a civil action in Arkansas.

Finally, in *Thomas*, a District of Columbia resident, hired in the District of Columbia, was injured in Virginia. After obtaining worker's compensation in Virginia, he applied for District of Columbia workers' compensation. Although the Fourth Circuit held that Virginia law prohibited the second recovery, this Court reversed. In balancing the interests of the Commonwealth of Virginia, this Court concluded that it did not have sufficient interest to prevent a second recovery by the injured worker. *Thomas*, *supra*, at 448 U.S. 280, 285-86.

jurisdiction of federal district courts. As a result, certiorari is merited and should be granted.

III. The Fourth Circuit--By Affirming The Decision Of The United States District Court Not To Grant Sanctions, Costs And Attorneys' Fees For The Violations, By The United States Government And Its Counsel, Of 28 U.S.C. Section 1927, And Rule 11 Of The Federal Rules Of Civil Procedure-- Acted Contrary To The Principles Of The Decisions Of This Court And Other Circuits.

On February 9, 1987, the United States Air Force denied the claims of the widow and children of the late Leon H. Cassutt under the Federal Tort Claims Act, based, in part, upon the position of the United States Government that the late Leon H. Cassutt was a "statutory employee" of the United States Air Force.[41]

Notwithstanding the fact that the United States Government believed that it possessed a defense that denied the United States District Court jurisdiction to hear Petitioner's Federal Tort Claims Act case, and notwithstanding the fact that the United States had in its possession all the factual underpinnings upon which its statutory employer defense was based,[42] the United States Government through its counsel did not file its motion to dismiss until after the close of discovery and the filing of all pretrial documents.

By waiting until after the close of discovery, the United States compelled Petitioner to complete discovery--including taking the depositions of numerous government witnesses located in north-

---

[41] The letter from the United States Government is reproduced in the Appendix, hereto. App. 22a

[42] The Government's Motion for Summary Judgment was supported by statements of United States Government officials; by United States Government documents (*i.e.*, contracts between the United States Government and individual contractors); in one case by the statement of an employee of a contractor to the United States Government; and, the September 28, 1986, deposition of Mrs. Lillian Cassutt, the widow of the late Leon H. Cassutt taken in the earlier lawsuit against ARC. All of this information was available to the Government long before the filing of the instant lawsuit, on February 24, 1987.

ern Virginia, Texas, and California--and to prepare completely for trial. Petitioner thereby incurred discovery and trial preparation costs of tens of thousands of dollars. After the close of discovery, after the submission--by both the United States Government and Petitioner of all trial documents (including hundreds of exhibits and a list of witnesses), after the pretrial conference, and after the setting of a trial date, the United States Government moved for leave to file a motion to dismiss out-of-time. It was that motion to dismiss--based upon the statutory employer defense--which the United States District Court erroneously granted.[43]

Prior to seeking the dismissal of Petitioner's Complaint, the United States regularly, consistently, and frequently, called upon the jurisdiction of the United States District Court to entertain the Government's various Motions, all the while believing that the United States District Court lacked the very jurisdiction which counsel for the Government sought to use, and did use, for the entire time leading up to and after the pre-trial conference. By its conduct, the Government and its counsel violated 28 U.S.C. Section 1927.[44]

---

[43] At that time, Petitioner filed a Motion for Appropriate Sanctions against the Government in accordance with Rule 11 of the Federal Rules of Civil Procedure, and 28 U.S.C. Section 1927. That Motion was denied. App. 8a

[44] Petitioner further believes that the Government, by the actions of its counsel, violated Rule 11 of the Federal Rules of Civil Procedure. On July 15, 1987, counsel for the Government filed with the United States District Court a Motion for Leave to File a Motion for Summary Judgment After Close of Discovery. In that Motion, the Government argued:

> [D]ue to the extensive discovery conducted by plaintiffs in the case, the defendants have not had an opportunity to present the statutory employer defense to the Court for consideration.

Id. Further, the Government asserted:

> 5. Information developed through the discovery process suggests that plaintiffs' claims against the government are barred by the exclusivity provisions of the Virginia Worker's Compensation Act and thereby provides the government with the statutory employer defense.

Id. The Government knew this statement to be untrue since the United States Air Force had come to that conclusion--at least as early as February 4, 1987, prior to the Petitioner's filing of the instant Complaint--in a United States Air Force

It is this conduct of the Government and its counsel which Petitioner faults as unnecessarily and vexatiously burdening the United States District Court while causing Petitioner to incur unnecessary costs, expenses and attorneys' fees, all in violation of the United States Code.[45]

The Fourth Circuit, in affirming the decision of the United States District Court, ruled contrary to the principles contained within, if not the express holdings of, numerous federal district courts as well as the Court of Appeals for the Third Circuit.[46]

The Fourth Circuit decision also appears in conflict with the principles announced by this Court in earlier decisions regarding the inherent power of federal courts to award monetary sanctions for attorney misconduct.

The conduct of the United States in this case--by delaying the filing of its dispositive motion until after the close of extensive discovery--unjustifiably compelled the Petitioner to incur all the costs Petitioner would incur during this case, except only those costs for the presentation of evidence during the trial.[47] If the Fourth Circuit decision is permitted to stand, then the United States will be able to coerce unfairly other claimants under the Federal Tort Claims Act. As a result, there will be a subtle, but dangerous erosion in the viability of the Federal Tort Claims Act.

Legal Memorandum, which cited to documentary evidence and legal holdings which the Government believed supported that position.

[45] Although counsel for Petitioner has always represented the Petitioner on a contingency fee arragement, for the purposes of the Section 1927 and Rule 11 sanctions arguments here, counsel for Petitioner believes attorneys' fees calculated at hourly fee rates are legally justified and are, therefore, included in the sanctions requested here.

[46] *Eash* v. *Riggins Trucking, Inc.*, 757 F.2d 557, 565 (3rd Cir. 1985) (*en banc*); *see also Baker Industries, Inc.* v. *Cerberus Limited*, 764 F.2d. 204, 211-12 (3rd Cir. 1985); *Itel Containers International* v. *Puerto Rico Marine Management*, 108 F.R.D. 96, 106 (D.N.J. 1985); *Olga's Kitchen* v. *Papo*, 108 F.R.D. 695 (E.D. Mich. 1985); *Dominquez* v. *Figel*, 626 F.Supp. 368 (N.D. Ind. 1986).

[47] If the United States Government had filed its motion to dismiss--based on the statutory employer defense--prior to filing its Answer, and the District Court had ruled in the Government's favor, then Petitioner would have incurred no discovery costs prior to the dismissal of his action, and appeal to the Fourth Circuit.

Finally, if the Fourth Circuit decision is permitted to stand, the ability of Rule 11, and 28 U.S.C. Section 1927, to restrain, and, if unrestrained, to punish the abusive practices of powerful defendants and their counsel will be eroded, if not totally eliminated.

CONCLUSION

This Court, in the past, has refused to permit the erosion of the salubrious effects of the Federal Tort Claims Act. Yet if the decision of the Fourth Circuit is permitted to stand, the ability of the Federal Tort Claims Act to encourage safe practices by the United States Government and to compensate injured men and women, or their loved ones, will be significantly eroded, in a manner never intended by the United States Congress, by the Commonwealth of Virginia, or by the State of California.

In addition, if the decision of the Fourth Circuit is permitted to stand, the Full Faith and Credit Clause of the United States Constitution will no longer be able to ensure the recognition of the policies of a sovereign state to fully compensate its workers, or the loved ones of those workers, for their injuries or death, when those policies are neither "obnoxious" nor "hostile" to the policies of other states.

Finally, if the decision of the Fourth Circuit is permitted to stand, the ability of the Federal Rules of Civil Procedure and of federal law to prevent the Government and other powerful defendants from abusing both the discovery process and the timing of dispositive motions will be seriously weakened.

For all of these reasons, as well as for all of the reasons contained in this Petition, this Court should exercise its discretion to review the Fourth Circuit's decision in this case.

Respectfully submitted,

STEPHEN WILLIAM COMISKEY
(Counsel of Record)
COMISKEY & HUNT
4023 Chain Bridge Road
Fairfax, Virginia 22030
(703) 352-1700

Attorney for Petitioner

APPENDIX

TABLE OF CONTENTS

		PAGE
I.	Opinion and order sought to be reviewed	
	William Perry Pendley, Administrator of the Estate of Leon H. Cassutt, Deceased v. *United States of America*, 856 F.2d 699 (4th Cir. 1988)	1a
II.	Other opinions and orders rendered in this case	
	Order of the United States District Court Dismissing Plaintiff's Complaint (July 31, 1987)	7a
	Order of the United States District Court Denying Plaintiff's Motion for Appropriate Sanctions and Motion for Reconsideration (September 10, 1987)	8a
III.	Order on rehearing	
	Order of the Fourth Circuit Denying Plaintiff-Appellant's Petition for Rehearing and for Rehearing *En Banc* (October 14, 1988)	9a
IV.	Other opinions	
	Walter B. Vandergrift, Administrator of the Estate of Walter James Vandergrift, Deceased, v. *United States of America*, No. 80-1066 (4th Cir. October 7, 1980)	10a
	Jesus Garcia v. *Pittsylvania County Service Authority*, and *Elfido Morales* v. *Pittsylvania County Service Authority*, 845 F.2d 465 (4th Cir. 1988)	12a
V.	Text of federal statutes involved	
	28 U.S.C.	
	Section 1346	18a
	Section 1927	18a
	Section 2674	18a
	Section 2675	19a

VI. Text of Federal Rule of Civil Procedure involved

Rule 11 . . . . . 20a

VII. Text of State Statutes involved

Code of Virginia
Section 65.1-29 (1980 Repl. Vol.) 21a
Section 65.1-34 (1980 Repl. Vol.) 21a
Section 65.1-40 (1980 Repl. Vol.) 21a

VIII. Other

Letter from David W. Woodring, Major, United States Air Force to Stephen W. Comiskey, Counsel for Petitioner (February 9, 1987) 22a

In the

United States Court Of Appeals

For the Fourth Circuit

No. 87-3148

William Perry Pendley, Administrator of the Estate of Leon H. Cassutt, Deceased,

Plaintiff-Appellant,

v.

United States of America,

Defendant-Appellee,

and

United States Department of Defense; United States Air Force; United States Strategic Defense Initiative Organization; Edwin Meese, Attorney General of the United States

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
No. CA-87-175-Albert V. Bryan, Jr., Judge.

ARGUED APRIL 5, 1988 - DECIDED SEPTEMBER 19, 1988

Before WIDENER and SPROUSE, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

WIDENER, Circuit Judge. William Perry Pendley, the administrator of the estate of Leon H. Cassutt, brought this wrongful death action under the Federal Tort Claims Act against the United States. The district court dismissed the case on the ground that the United States was Cassutt's statutory employer under the

Virginia Worker's Compensation statute which is an exclusive remedy and deprives the court of jurisdiction for an action in tort. We agree that the United States was the statutory employer and affirm the judgment of the district court.

On September 19, 1985, Leon Cassutt was killed as a result of a solid rocket propellant fire at the Atlantic Research Facility's Pine Ridge Plant in Gainesville, Virginia. Cassutt was an employee of the Aerospace Corporation. Specifically, Aerospace was operating under a contract with the United States Air Force Space Division to provide engineering consulting and analysis with respect to work being done by Atlantic Research for the Air Force. Cassutt was at the Pine Ridge plant pursuant to the contract (the 0084 contract) between Aerospace and the Air Force and was acting within the scope of his employment at the time he was killed.

The activities which Cassutt was to observe were being conducted by Atlantic Research pursuant to a separate contract between the Air Force and Vought Corporation (the 0041 contract). Atlantic Research was a subcontractor for Vought under the 0041 contract.

The Air Force also contracted directly with Atlantic Research for research and development in rocket propellant bonding systems (the 0055 contract). It was work done pursuant to the 0055 contract that specifically lead to the fire which killed Cassutt.

The three contracts at issue were similar in many respects. The Air Force did not have the right to hire or fire employees or supervise the day-to-day operations, but did retain a right of oversight and inspection of the final product. Each contract contained a clause that held the contractors responsible for safety irrespective of any government oversight. All the contracts required the contractors to obtain and maintain workers compensation insurance, the premiums to be reimbursed by the government.

The plaintiff brought this suit under the Federal Tort Claims Act.[1] After extensive discovery and various rulings on motions for

---

[1] The plaintiff had earlier filed his claim pursuant to 28 U.S.C. § 2675(a). By letter, the United States denied the claim.

summary judgment, which need not concern us here, the court dismissed the case, as we have noted.

As an initial matter, we must decide which law should be applied in the case. The plaintiff argues that since Cassutt was a California resident, working for a California Corporation pursuant to contracts entered into by the Air Force in California, that the law of California[2] should apply despite the occurrence of the accident in Virginia. We disagree. We have only recently held that the law of Virginia controlled in a case in which an injured employee, a resident of North Carolina, of an independent North Carolina contractor, employed under a North Carolina contract of employment, who had received North Carolina worker's compensation, sued the Service Authority, owner, and another independent contractor on the job, on account of an accident which occurred in Virginia. *Garcia v. Pittsylvania County Service Authority*, 845 F.2d 465 (4th Cir. 1988). The fact situation in *Garcia* is indistinguishable from that existing here, and we see no need to discuss this conflicts question at greater length. [3]

Having decided that Virginia law applies, the question becomes whether the Air Force was an employer within the statutory meaning of Va. Code Ann. § 65.1-29 (1987) so as to qualify for bar of tort recovery under the exclusive remedy provisions of § 65.1-40. The parties agree, as the statute requires, that a determination that the Air Force was a statutory employer requires a finding that Cassutt was executing work which was part of trade, business or occupation of the Air Force. *Floyd v. Mitchell*, 203 Va. 269, 123 S.E. 2d 369 (1962). The parties differ, however, in the test that they would apply to make that determination.

The usual situation in worker's compensation cases in determining whether the defendant is a statutory employer is not com-

---

[2] Benefits were paid to Cassutt's beneficiaries under California Workers' Compensation law on the application of Aerospace, his employer.

[3] *Garcia* was not brought under the FTCA, but we do not view that as distinguishing it from the instant case. 28 U.S.C. § 1346(b) only strengthens the argument that the proper law to apply is the " . . . law of the place where the act or omission occurred."

plex. However, in cases such as this, which involve independent contractors and their employees, the analysis is complicated by the fact that such a case is of the variety which has been referred to in Virginia as an upside down worker's compensation case. See *Henderson v. Central Tel. Co. of Virginia*, 233 Va. 377, 382, 355 S.E. 2d 596, 599 (1987). Normally, the plaintiff would seek a broad interpretation of the statutory definition of employer so as to bring the defendant within its scope and collect worker's compensation. But when, as here, the plaintiff seeks a recovery in tort law, the aim is to narrowly construe the definition so as to avoid the exclusive remedy bar of § 65.1-40.

The Virginia court in *Shell Oil Co. v. Leftwich*, 212 Va. 715, 187 S.E. 2d 162 (1972), announced that the test for an employee of a subcontractor in that case was whether an indispensable action of the statutory employer was "...*normally* carried on through employees rather than independent contractors." *Id.* at 167 (quoting Larson, *The Law of Workmen's Compensation*, Vol. IA § 49.12). (Emphasis in treatise.) Under this test, which plaintiff depends upon, the Air Force might well not be a statutory employer since Air Force personnel did not normally perform the type of work that Cassutt did. But the *Shell Oil* rule is not utilized by the Virginia court in each instance. In *Henderson v. Central Tel., supra*, the Court decided that the *Shell* test would not apply to an employee of a contractor installing telephone switching equipment for Centel although Centel could have performed the work itself. The Court reasoned that if *Shell* were carried to its logical conclusion, a business which operated entirely through subcontractors would totally escape worker's compensation liability. *Henderson*, 355 S.E. 2d at 599. Since the fundamental purpose of the Worker's Compensation Act is remedial, this is best accomplished by a liberal construction to advance that end, "... for the beneficent purpose of providing compensation, in the nature of insurance, to a workman or his dependents, in the event of his injury or death ...." *Fauver v. Bell*, 192 Va. 518, 522, 65 S.E. 2d 575, 577 (1951). In applying the approach of *Henderson*, the test is what the statutory employer, in this case the Air Force, is re-

quired to do, what it is mandated to do by statute or regulation. *Id.* at 600.

It is argued, however, that to apply the *Henderson* test in a case of a public employer conflicts with the requirement under the FTCA that the government be treated as a private individual in like circumstances. 28 U.S.C. § 1346(b). That approach reads *Henderson* too narrowly. The analysis in *Henderson* was applied not to give the utility a special status, but because its peculiar circumstances required a different analysis in order to give the Worker's Compensation Act its full remedial purpose. The trade, business, or occupation of the Air Force is no less governed by statute and regulation than was that of the *private* corporate telephone company in *Henderson*. Each of the three contracts involved in this case were carried out pursuant to the function of the Air Force to develop space weapons systems, undoubtedly the "trade, business or occupation" of the Air Force. While the Air Force will be held liable under the FTCA as an individual, the analysis of *Henderson* is appropriate in order to effectuate the remedial purpose of the Worker's Compensation Act.

The plaintiff relies on *Indian Towing Co. v. USA*, 350 U.S. 61 (1955), for the proposition that the United States must be treated as a private individual in FTCA cases. That, of course, is the requirement of the statute. 28 U.S.C. § 2674. But what plaintiff does not acknowledge is that statute requires that the liability of the private individual be "under like circumstances." As the Court pointed out in *Indian Towing*, under like circumstances the government might permit the operation of a private lighthouse, 350 U.S. at 66, just as the circumstances here were that the government engaged the contractors involved to perform its indispensable activity in developing space weapons systems. We think it is clear that in Virginia, under *Henderson*, if a private individual operates a business regulated by statute or regulation, what is "a part of his trade, business or occupation" is determined by the statutes and regulations under which he operates. Thus, the Air Force as a private individual, operating under statutes and regulations as it does in the development of space weapons systems, is no less an employer under Va. Code § 65.1-29 than was the private

telephone company operating under statutes and regulations in *Henderson*.

We are of opinion the Air Force Space Division was the statutory employer of Leon Cassutt. It follows that the exclusive remedy provision of Va. Code § 65.1-40 deprived the district court of jurisdiction in this case.

The judgment of the district court is accordingly

AFFIRMED.[4]

---

[4] We also affirm the district court's denial of sanctions, costs and attorneys' fees.

In The

United States District Court For The

Eastern District Of Virginia Alexandria Division

WILLIAM PERRY PENDLEY, Administrator of the Estate of Leon H. Cassutt, Deceased, et al.,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO. 87-175-A

ORDER

For the reasons stated from the bench, the court concluding that the defendant is a statutory employer of the plaintiff's decedent within the meaning of Va. Code § 65.1-29 (1980 Repl. Vol.), and that therefore the plaintiff's exclusive remedy is, pursuant to Va. Code § 65.1-40 (1980 Repl. Vol.), under the Virginia Workmen's Compensation Act, and that this court lacks jurisdiction to entertain this action, it is hereby

ORDERED that the motion of the defendant to dismiss is granted, and this action is dismissed.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
July 31st, 1987

In The

United States District Court For The

Eastern District Of Virginia Alexandria Division

WILLIAM PERRY PENDLEY, Administrator of the Estate of Leon H. Cassutt, Deceased, et al.,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO. 87-175-A

ORDER

Upon consideration of the plaintiff's Motion for Appropriate Sanctions and Motion for Reconsideration, it is hereby ORDERED that:

1. The plaintiff's Motion for Appropriate Sanctions is denied.
2. The plaintiff's Motion for Reconsideration is denied.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
September 10th, 1987

United States Court Of Appeals

For The Fourth Circuit

No. 87-3148

WILLIAM PERRY PENDLEY, etc.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Sprouse and Judge Michael.

/s/ H. E. Widener, Jr.
For the Court

Filed October 14, 1988

In The

United States Court Of Appeals

For the Fourth Circuit

No. 80-1066

Walter B. Vandergrift, Administrator of the Estate of Walter James Vandergrift, deceased,

Appellee,

v.

United States of America,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

ARGUED AUGUST 27, 1980 - DECIDED OCTOBER 7, 1980

Before HAYNSWORTH, Chief Judge, WINTER and MURNAGHAN, Circuit Judges.

PER CURIAM: The United States appeals a judgment against it in a wrongful death action brought under the Federal Tort Claims Act, 28 USC §§ 1346, 2671-2680, by the estate of the deceased, Walter J. Vandergrift. Vandergrift, a construction laborer employed by Sullivan Mechanical Contractors, Inc., was killed while working on the roof of a National Aeronautics and Space Administration (NASA) laboratory at Langley Research Center in Virginia. Sullivan was hired as a sheet metal subcontractor by Mechanical Projects, Inc. (MPI), the general contractor for an extensive modification of the NASA facility.

The United States argues that NASA was Vandergrift's statutory employer under the Virginia Workmen's Compensation

Act, and thus was immunized from tort liability by Virginia Code § 65.1-40. Section 65.1-29 provides that any owner that undertakes work which is a part of its trade, business or occupation through a subcontractor is a statutory employer of the subcontractor's employees for purposes of the Act. The district court held that Vandergrift was not engaged in work which was a part of NASA's trade, business or occupation, relying primarily on *Bassett Furniture Industries, Inc. v. McReynolds,* 261 Va. 897, 224 S.E.2d 323 (1976). On appeal, the government argues that *Bassett* is distinguishable because it involved a private owner, and that the court should apply two Virginia precedents involving public bodies, *Anderson v. Thorington Construction Co.,* 201 Va. 266, 110 S.E.2d 396 (1959) and *Williams v. Gresham Co.,* 201 Va. 457, 111 S.E.2d 498 (1959). We find it unnecessary to determine whether the Virginia Supreme Court has created separate standards under § 65.1-29 for private and public owners, because even if the United States is correct we must look to the state law governing the liability of a private person in an FTCA action. 28 USC §§ 1346(b), 2674. *See generally Rayonier, Inc. v. United States,* 352 U.S. 315 (1957); *Indian Towing Co. v. United States,* 350 U.S. 61 (1955). The district court correctly relied on *Bassett.*

The United States also contends that NASA was not negligent in failing to warn Vandergrift of the dangerous condition of the roof, that NASA's failure was not the proximate cause of his death, and that Vandergrift was contributorily negligent. After a careful review of the proceedings below, we find that the district court's findings to the contrary have adequate support in the record and are not clearly erroneous.

AFFIRMED.

In The

United States Court Of Appeals

For the Fourth Circuit

No. 87-2091

Jesus Garcia,

Plaintiff-Appellant,

v.

PITTSYLVANIA COUNTY SERVICE AUTHORITY;
William C. Overman Associates,

Defendants-Appellees.

No. 87-2092

Elfido Morales,

Plaintiff-Appellant,

v.

PITTSYLVANIA COUNTY SERVICE AUTHORITY;
William C. Overman Associates,

Defendants-Appellees.

Appeals from the United States District Court for the Western District of Virginia at Danville. Nos. CA-86-0056-D and CA-86-0057-D-Jackson L. Kiser, District Judge.

ARGUED JANUARY 4, 1988 - DECIDED APRIL 26, 1988

Before WIDENER and HALL, Circuit Judges, and BULLOCK, District Judge, Middle District of North Carolina, sitting by designation.

WIDENER, Circuit Judge: Jesus Garcia and Elfido Morales, plaintiffs, appeal the denial of their claims for damages

against Pittsylvania County Service Authority and William C. Overman Associates. For the reasons stated below, we affirm.

Plaintiffs were seriously injured on July 11, 1985 in an explosion while engaged in the construction of a sewer interceptor line. The line was owned by and under construction at the direction of the Authority, which, with financing from the Environmental Protection Agency and Farmers Home Administration, was constructing a portion of a major sanitary sewer system in the county, this section being known as the Sandy River Interceptor. Overman Associates, P.C., was engaged by the Authority by contract to perform engineering services for the entire project.

The Authority awarded the contract for the Sandy River section of the project designated 83-5-S to Roanoke Construction Company. Garcia and Morales were employees of Roanoke. The work performed included digging trenches, laying pipe and blasting rock. The plaintiffs were injured when a jackhammer being operated by Morales came into contact with an unexploded dynamite charge left from an earlier blasting.

Roanoke is a North Carolina corporation with its principal place of business in that State. Plaintiffs are North Carolina residents and were employed by Roanoke in that State, they say pursuant to oral contracts of employment. They have received workers' compensation benefits pursuant to the North Carolina Workers' Compensation Act, N. C. Gen. Stat. § 97-1, et seq., on account of Roanoke's workers' compensation coverage. They subsequently filed these actions in the United States District Court for the Western District of Virginia against the Authority and Overman, on June 18, 1986, seeking damages on account of their injuries. Defendants moved to dismiss the complaints on the grounds, inter alia, that plaintiffs' actions were barred by the exclusive remedy provision of the Virginia Workers' Compensation Act, Va. Code § 65.1, et seq. The district court dismissed the complaints for the reason that the claims were so barred, and these appeals followed.

Prior to *Carroll v. Lanza*, 349 U.S. 408, 75 S. Ct. 804, 99 L. Ed. 1183 (1955), it had been held, in *Liberty Mutual Ins. Co. v. Goode Const. Co.*, 97 F. Supp. 316 (E.D. Va. 1951), that *Solomon*

v. Call, 159 Va. 625, 166 S.E. 467 (1932), held that Virginia looked to the State of the injured workman's residence, when the accident occurred within Virginia, and the contract of employment was in the State of residence of the workman. In both of these cases, the Virginia workers' compensation law was not to apply to employees, injured in Virginia, who were residents of other States, working for out of state employers, in Virginia, thus allowing the injured employee to pursue his action for negligence against his employer in *Liberty Mutual* and against a stranger in *Solomon*.

The Supreme Court, however, in *Carroll*, held that, in workers' compensation cases involving differing state compensation statutes, the State where the injury occurred was not required to give full faith and credit to the workers' compensation act of the State of employment. The Court relied on *Pacific Employers Ins. Co. v. Commission*, 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939), which had held that the law of the forum State might prevail if the injury occurred in the forum, and stated that one State might not preclude another "from prescribing for itself the legal consequences of acts within it." 306 U.S. at 505, 59 S. Ct. at 634.

Under Virginia law, after *Carroll*, this court affirmed a summary judgment granted by the district court, on essential facts indistinguishable from those present here, in favor of a Virginia defendant in *Home Indemnity Company of New York v. Poladian*, 270 F.2d 156 (4th Cir. 1959). The employee in *Home Indemnity* was a resident of the District of Columbia working for a D.C. employer (a subcontractor) on a construction project in Virginia. After being injured on the job, the employee elected to recover compensation in the District of Columbia, and Home Indemnity as subrogee brought suit on the employee's claim against the general contractor. This court stated that "in determining whether an actionable tort has been committed in Virginia we look to its laws, for it is within Virginia's competence to take away the common law right of action if it deems more just to award fixed compensation irrespective of negligence." 270 F.2d at 158. We held that the general contractor, as a statutory employer who had complied with the Virginia Act, was protected from the action in

negligence by the Act even though no such bar existed under District of Columbia law.

In the case of *McCann v. Newport News Shipbuilding and Dry Dock Company*, 177 F. Supp. 909 (E.D. Va. 1959), the district court followed *Carroll* and *Home Indemnity* and held that the law of the State of the accident controls the remedy sought in that particular forum. 177 F. Supp. at 913. The court declined to follow *Liberty Mutual*'s construction of *Solomon*. Thus, a New Jersey resident who was an employee of a New Jersey company, injured on the job at the defendant's shipyard in Virginia, who had collected compensation in New Jersey, was not allowed to bring suit in Virginia against the shipyard owner because the plaintiff had a right to workers' compensation against the shipyard owner, a statutory employer. The court further found that the defendant had complied with the workers' compensation act, and was the statutory employer of the injured employee who was engaged in the "trade, business or occupation" of the shipyard at the time the injury occurred. 177 F. Supp. at 914.

[1] It is apparent to us, in the development of the law on the question at hand from *Solomon* to the present, that *McCann* states the present law of Virginia on the subject, and even if *Liberty Mutual* was a correct construction of *Solomon* at the time it was decided, it no longer has validity in view of *Carroll* and *Home Indemnity*. We are thus of opinion that the law of Virginia controls for this accident which occurred in Virginia and was occasioned by the negligence of an independent contractor with the Authority who was doing work in Virginia and required by Virginia law to have workers' compensation insurance.

Most of the rest of the questions in the case are answered by *Anderson v. Thorington Construction Co.*, 201 Va. 266, 110 S.E. 2d 396 (1959). In that case, the Richmond-Petersburg Turnpike Authority was arranging for the construction of a portion of the Richmond-Petersburg Turnpike. The Authority was a political subdivision of the Commonwealth created to construct the turnpike. It engaged Thorington Construction Company and another as joint adventurers to perform a section of the work. The Turnpike Authority also engaged an engineering firm to provide

the services of consulting engineers for the project. It was the engineers' duty to see that the construction was performed in accordance with approved specifications. Anderson, the plaintiff, at the time of his injury, was performing his duties for the consulting engineers. He sued Thorington on account of injuries he suffered while injured on the job allegedly caused by the negligence of Thorington's employees. The trial court dismissed the case as a matter within the exclusive jurisdiction of the Industrial Commission of Virginia under the workers' compensation statutes, and its judgment was affirmed. The Virginia Supreme Court reasoned that both Thorington and the engineers were independent contractors with and under the Turnpike Authority. It held that both Thorington and the engineers were engaged in the construction of the turnpike which was a part of the trade, business or occupation of the Authority, and that since both were engaged in the trade, business or occupation of the Authority, neither was a stranger to the employment so as to be susceptible to suit. Both, the court held, were under "the canopy of the Workmen's Compensation Act." It held that the Turnpike Authority as the owner was liable to Anderson for workmen's compensation benefits and that Anderson was a statutory employee of the Turnpike Authority. It also held that the employees of Thorington were statutory employees of the Turnpike Authority. As such, the employees of the engineers and the employees of Thorington were statutory fellow servants. The court held Anderson could not maintain his action on account of the negligence of Thorington which caused the injury because that would amount to a suit against a statutory fellow servant and barred by the workmen's compensation act.

[2,3] The plaintiff argues that the Service Authority in this case is not the statutory employer of the plaintiffs. We reject that argument, however, as did the Virginia court in *Anderson*. The Authority here is organized to acquire, construct, operate and maintain water and sewer systems. See Va. Code §§ 15.1-1239, et seq.; 15.1-1250. The Authority in *Anderson* was authorized "to construct, maintain, repair and operate the turnpike project." 110 S.E.2d at 397. We see no difference of any significance in the pur-

poses for which the two authorities were organized and empowered to act except that one authority concerned a turnpike and the other water and sewer systems. We also think that the holding in *Anderson* that those employed by a public authority to engage in the very work it was organized and authorized to do, are engaged in the trade, occupation and business of the owner, is binding on us here. *Anderson*, 110 S.E.2d at 400, 401. It follows that the holding of the *Anderson* court, that the two contractors engaged in the project and their employees were each statutory fellow servants, is also binding on us in this case. Accordingly, the argument made by the plaintiff that he may maintain his suit against Overman, a statutory fellow servant of Roanoke, is precluded by the decision in *Anderson* precluding Anderson from maintaining his suit against Thorington.

Finally, the plaintiff argues that in any event the Authority here, as a statutory employer, did not have workers' compensation insurance. The district court accepted as proof of insurance a certificate of insurance offered by Roanoke showing on its face that it had been delivered to the Authority, and so do we. (We need not rely on the fact that the Authority had its own and a different workers' compensation policy which may well have covered the plaintiff.)

The judgment of the district court is accordingly

AFFIRMED.

28 United States Code

§ 1346.(b) United States as defendant

(b) Subject to the provisions of chapter 171 of this title [28 USC §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

§ 2674. Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

Federal Rule of Civil Procedure

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Code of Virginia

§ 65.1-29. Liability of owner to workmen of subcontractors

When any person (in this section and §§ 65.1-31 and 65.1-32 referred to as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 65.1-31 to 65.1-34 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay if the workman had been immediately employed by him.

§ 65.1-34. Workman may recover from subcontractor

Nothing in §§ 65.1-29 through 65.1-33 shall be construed as preventing a workman from recovering compensation under this Act from a subcontractor instead of from the principal contractor but he shall not collect from both.

§ 65.1-40. Employee's rights under Act exclude all others

The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C. 20332-6128

February 9, 1987

Stephen W. Comiskey
Comiskey & Hunt
4023 Chain Bridge Road
Fairfax, Virginia 22030

Re: Claim of Mrs. Leon Cassutt and the Estate of Leon Cassutt

Dear Mr. Comiskey:

Under the Federal Tort Claims Act, 28 U.S.C. 2671-2680, I have considered your clients' claim for damages resulting from the alleged wrongful death of Leon H. Cassutt on 19 September 1985 in a fire at the Atlantic Research Corporation in Gainesville, Virginia. After a careful review of the facts and applicable law, I deny the claim.

At the time of this unfortunate incident, Mr. Cassutt was working as an employee of the Aerospace Corporation, pursuant to the terms of a contract with the U.S. Air Force. Because Mr. Cassutt was injured on the job while performing work in the general trade or business of the Air Force, he is a statutory employee of the U.S. Air Force. Thus, the exclusive remedy for your clients is that which is provided by the Virginia Workers' Compensation statute. There is no recovery under the Federal Tort Claims Act.

Further, the Air Force is not liable for the negligence of its independent contractors. The only negligence, if any, which resulted in the unfortunate incident was on the part of employees of Atlantic Research Corporation, an independent contractor of the Air Force. The Air Force is not liable for these actions.

Additionally, there was no negligence or wrongful act or omission on the part of any government employee, a prerequisite to recovery under the Federal Tort Claims Act. Therefore, your clients' claim must be denied.

If your clients are dissatisfied with this decision, they may file suit in an appropriate United States District Court no later than six months from the date of mailing of this letter.

Sincerely,

/s/ David W. Woodring

DAVID W. WOODRING,
Major, USAF
Chief, Tort Branch
Claims & Tort Litigation Staff
Office of The Judge Advocate
General